Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSVALDO ALVAREZ,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT 142,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT IAM DISTRICT 142

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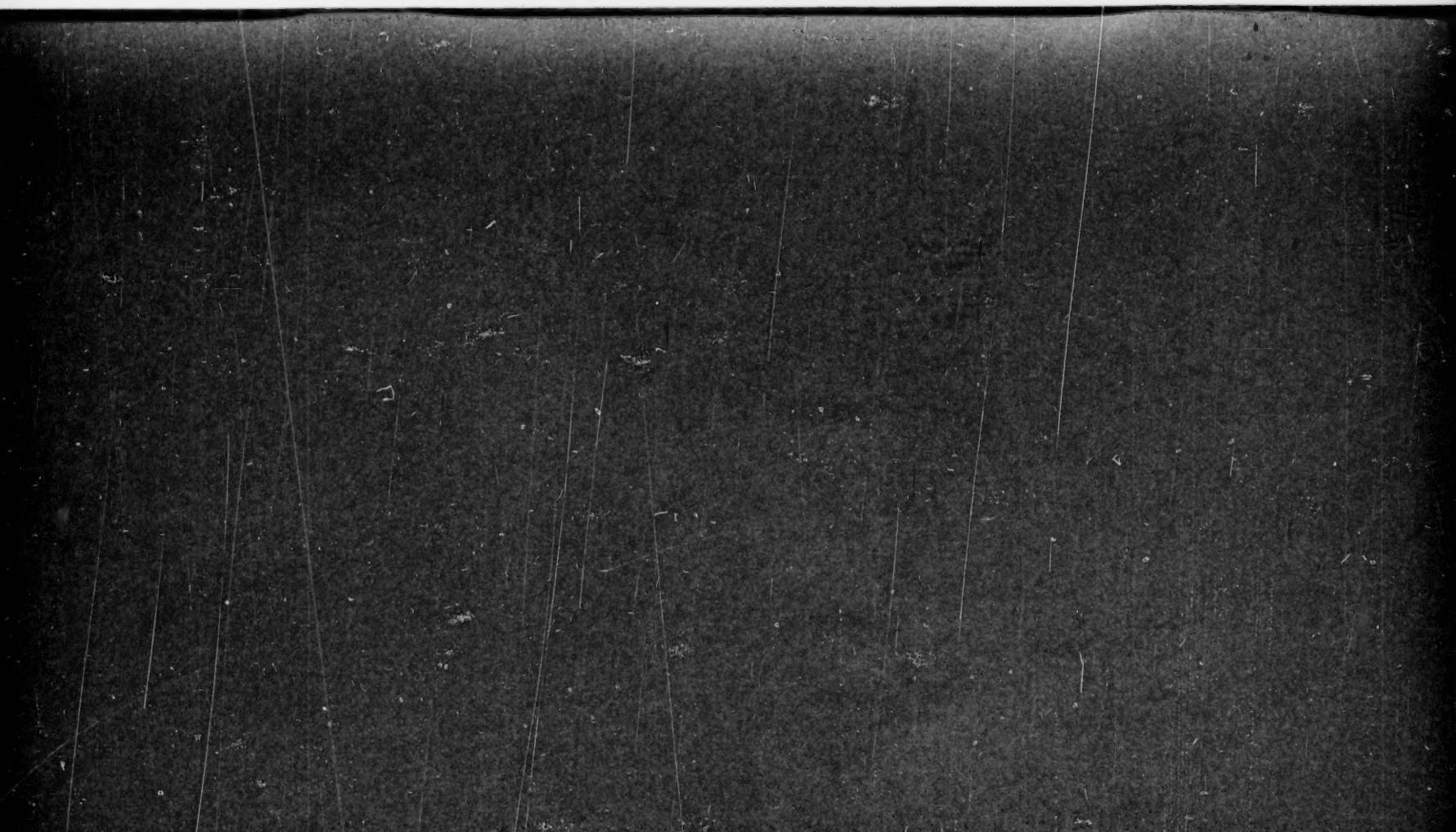

QUESTIONS PRESENTED

Of the five questions presented by Petitioner only the first two and possibly the third apply to Respondent Union. The remaining questions relate to issues solely involving Respondent TWA. Accordingly, we will restrict our comments to the first three issues tendered by Petitioner.

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BRIEF IN OPPOSITION OF RESPONDENT IAM DISTRICT 142

OPINION BELOW

Petitioner has failed to include the trial court's dismissal of the Respondent Union stated from the bench on February 5, 1987, and subsequently incorporated into an unreported written order dated February 26, 1987. Those opinions are recited *infra* under the heading "Procedural History Below" at pp. 8-11.

JURISDICTION

We accept Petitioner's statement of the basis for jurisdiction.

STATUTES INVOLVED

Although Petitioner does not mention it, the primary statute involved is the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, which creates the judicially implied duty of fair representation for unions acting as exclusive collective bargaining representatives of employees pursuant to *Steele v. Louisville & Nashville Ry*, 323 U.S. 192 (1944); *Tunstall v. Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Vaca v. Sipes*, 386 U.S. 171 (1967), and their progeny.

STATEMENT OF THE CASE

Substantive Facts [1]

Petitioner, Osvaldo Alvarez, began employment for TWA on February 16, 1966. Thereafter, he was represented by the Union and covered under its collective bargaining agreements. Prior to Alvarez's last discharge, the Union had successfully processed three grievances for him, two of them reversing attempted terminations for misconduct.

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[1] Petitioner's factual statement is incomplete, misleading and improper. For example, (1) there is no evidence that the disputed check "[bore] a crude likeness of Alvarez's signature (p. 10); (2) there is no evidence "TWA was represented by an attorney" (p. 11) at the arbitration; (3) the note referenced at page 12 of Petitioner's brief was rejected as evidence by the trial court; (4) there is no evidence that "the arbitrator told a Union official not to worry about the outcome of the grievance since the arbitrator 'owed one' to the Union" (p. 14) or that it was obvious to the parties that Alvarez did not "steal the check in question" (p. 18). Also, Alvarez fails to note that there is no evidence supporting his theory that the Union purposefully lost his grievance and that his own testimony was:

> I have no evidence, definite proof. This is only what I think. All right? . . . I mentioned that I do not have definite proof . . . it is just my belief. I am in a free country. I believe what I want, right? I am not accusing anybody directly. I don't have the proof. I am going to a little conclusion.

Effective August 8, 1983, TWA discharged Alvarez because, TWA concluded, Alvarez had signed documents denying receipt of his paycheck which, in fact, he had reported missing but then had endorsed and deposited into his bank savings account after obtaining a replacement check from TWA. TWA claimed to prove Alvarez's endorsement through a professional document examiner, Andrew B. Herberer. The discharge followed on August 3, 1983, preliminary hearing before a TWA hearing officer at which the local union represented Alvarez (through Union steward Vincent Garcia) and presented Alvarez and his own handwriting expert, Edward Whittaker, to deny any wrongdoing. After Alvarez's termination, a grievance was filed and on August 22, 1983, District 142 (through General Chairman James McCloat) submitted it to Step 3 of the grievance procedure. After TWA denied the appeal, McCloat submitted the dispute to final and binding arbitration before the System Board of Adjustment which included David L. Beckman, a professional arbitrator, as chairman. Prior to the arbitration hearing, McCloat met with Alvarez, Garcia and professional document examiner Whittaker to prepare for the hearing. At an "all day" arbitration hearing on August 9, 1984, District 142, acting through McCloat, asked the Board to reinstate Alvarez with full seniority and backpay and to reimburse Alvarez's costs for Whittaker. District 142 called three witnesses—Alvarez, Whittaker and Garcia. Alvarez denied possessing, signing or depositing the check; he testified about everything he could remember from the day the disputed paycheck was found missing until the day he was fired. He also testified about his prior involvement with the FBI and his notion that he had been railroaded by some conspiracy.[2] Whittaker testified the signature on the disputed check was not made by Alvarez and Garcia supported Alvarez's

[2] Despite repeated requests from the arbitrator and both parties at the hearing, Alvarez refused to name anyone who had engaged in such a conspiracy although he claimed to know their identity.

testimony concerning the disputed check. McCloat cross-examined TWA's four witnesses, introduced exhibits, made objections, and presented opening and closing arguments. District 142 presented evidence on and argued the following points: (1) TWA did not have "just cause" for discharge; (2) TWA did not prove its allegations; (3) Alvarez was innocent until proven guilty; (4) TWA's case was circumstantial and TWA railroaded Alvarez; (5) there was no proof that Alvarez took the check or deposited it into his account; (6) TWA's rules had not been violated and there was no untruth in any document executed by Alvarez; and (7) the Union's expert established that Alvarez had not signed the disputed check and the testimony of TWA's expert to the contrary was not credible. At the conclusion of the hearing, Alvarez thanked McCloat for the Union's efforts.

In the Board's August 13, 1984 Opinion and Award (with the Union-appointed member dissenting), the arbitrator wrote a ten-page decision containing the issues, the position of the parties, the factual background and his opinion. In final analysis, the arbitrator did not give full weight to the Union expert's opinion because it was made without knowledge that Alvarez had injured his hand shortly before the disputed document was signed. Moreover, the arbitrator listed certain inconsistencies and damaging testimony by Alvarez which discredited him, including Alvarez's contention that there was "some giant conspiracy to get rid of him". For these reasons, the Board denied the grievance—a decision that was final and binding on the parties. At trial before the district court, Alvarez admitted he would have won the arbitration case if the System Board majority accepted either his testimony or Whittaker's opinion.

Procedural History Below

Alvarez filed his complaint on January 9, 1985, in seven counts, invoking jurisdiction under 29 U.S.C. § 185 (commonly known as "§ 301" of the National Labor Re-

lations Act, as amended). Only Counts I and VII related to District 142. Count I alleged (1) the Union breached its duty of fair representation in processing and arbitrating his termination grievance and (2) TWA breached the collective bargaining contract by discharging him without just cause. In Count VII Alvarez alleged Defendants had treated him negligently. Alvarez prayed for reinstatement, $10,000,000 damages plus court costs and attorney fees.

On February 13, 1985, District 142 filed a motion to dismiss for lack of jurisdiction under § 301. TWA joined the Union's arguments and also moved to dismiss the additional claims against it based on preemption and failure to state a claim. Alvarez received permission to amend his complaint by alleging jurisdiction under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, by adding a Title VII count against TWA, and by including the Union in Count VI alleging "Civil Conspiracy". District 142 answered. On May 20, 1985, TWA moved to dismiss the amended complaint, claiming failure to state certain claims and preemption of others.

Meanwhile, on May 17, 1985, Alvarez filed a jury demand, and on May 23, 1985, District 142 opposed it.

On November 4, 1985, the trial court denied TWA's motion to dismiss Count I but granted its motion to dismiss Counts II through VIII. Specifically, the court dismissed Count II because that allegation (TWA "framed" Alvarez) had been submitted to arbitration by the Union and, accordingly, was beyond the court's jurisdiction. Counts III through VII were dismissed as preempted, and Count VIII was dismissed for failure to state a claim. The court retained jurisdiction over Count I involving District 142 to determine whether it breached its duty of fair representation by engaging in "arbitrary, discriminatory or . . . bad faith" conduct which "seriously undermines the integrity of the arbitral process" requir-

ing remand to arbitration before the System Board of Adjustment. The court stated that it intended to proceed only against the Union while retaining TWA as an indispensable party until the Union issues were resolved. On January 7, 1986, Alvarez asked for clarification of the court's dismissal of his Title VII claim against TWA.[3] TWA opposed Alvarez's clarification motion. On January 24, 1986, the court reinstated the Title VII claim against TWA originally contained in Count II. TWA answered the Title VII allegations and moved to strike Alvarez's claims for damages at law and demand for jury trial on Count II. This precipitated numerous filings, including a motion by TWA for summary judgment which the Court denied on September 23, 1986.

In the meantime, on December 26, 1985, invoking doctrine of pendent jurisdiction, Alvarez moved to join Barnett Bank, apparently for its alleged negligence in handling his account. No amended complaint was filed with the motion or subsequently tendered to the court. Both the Union and TWA opposed joinder.

On January 8, 1986, District 142 moved for summary judgment. Alvarez opposed it. On May 27, 1986, the court denied the Union's motion, finding, in relevant part, "that material issues of fact exist regarding the allegations that the Union breached its duty of fair representation . . . and conspired with Defendant TWA to terminate the Plaintiff's employment with TWA."[4]

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[3] Petitioner's papers stated, "The gravaman of the complaint . . . is that TWA and the union conspired together to insure that Mr. Alvarez would lose his grievance because neither of those parties could tolerate a government informant in their midst." After hearing all the evidence, including Alvarez's own testimony (see footnote 1 *supra*), the trial judge found this allegation was a figment of Alvarez's imagination.

[4] During trial, the trial judge remarked to Union counsel, "Your problem is you have a judge who does not believe in summary judgment".

Prior to trial, Defendants filed separate motions in limine to exclude any reference (1) to the Florida Department of Labor and Employment Security regarding Alvarez's right to or receipt of unemployment compensation benefits; and/or (2) to the fact that the Union did not use an attorney to arbitrate Alvarez's grievance. Alvarez opposed the motions. On January 21, 1987, the court deferred its ruling until trial.

In the meantime, on January 16, 1987, the court issued an order striking Alvarez's claims for punitive damages against the Union. On January 20, 1987, TWA moved for clarification of its status under Count I, arguing that it should not be party to those allegations. On January 26, 1987, District 142 joined the request for clarification but contended that TWA should be party to the claim in Count I.

On January 30, 1987, TWA moved to separate and try sequentially the issues in Count I (then scheduled for jury trial) and Count II (then scheduled for court determination).

Trial commenced on February 2, 1987. The issues arising under Counts I and II were tried sequentially in part and simultaneously in part. The court referred Count I to a jury and ruled that, in relation to the issues raised in Count I, "TWA will remain and participate in full . . ." together with the Union, but that the court would decide Count II's Title VII allegations against TWA. Presentation of Count I before a jury occurred from February 2 to February 5, 1987. The court focused on the issue of whether the Union breached its duty of fair representation before the arbitration panel. The court allowed evidence about the Union's use of attorneys in arbitration. However, it disallowed evidence concerning Alvarez's state unemployment benefits. At the conclusion of Alvarez's evidence on Count I, in response to Defendants' Rule 50 motions, the trial court dismissed

any allegations of conspiracy or collusion between TWA and the Union, finding "I believe it is a figment of [Alvarez's] imagination. It will not be submitted to this jury". Then, after remarking that it "seems to me that it may be that as a matter of law [defendants] are correct", the trial court required Defendants to proceed with their evidence relating to Count I. Following their presentation, each Defendant renewed its Rule 50 motion to dismiss Count I. After hearing arguments and adjourning to review the evidence, the court granted the motions and dismissed the jury. It ruled: [5]

> THE COURT: Ladies and gentlemen, I have just scribbled out my reasoning and I will sort of ramble through it.
>
> As is reflected in the decision the government type of matter, United States Supreme Court and the Eleventh circuit have noted very simply the plaintiff's burden establishes breach of duty of fair representation. I think that it is absolutely mandated that we recognize that a union is allowed considerable latitude in the representation of an employee.
>
> Further recognize the grievance arbitration process is not conducted in a juducial forum, and that union representatives are not held to the strict standards of trial.
>
> The plaintiff must show the union's handling of the grievance was either arbitrary, discriminatory or in bad faith.
>
> As for example, when an arbitrarily or a mere tort or processes it in a perfunctory fashion.
>
> Holding of this Court, either bad faith or discriminatory, arbitrary perfunctory conduct for the union has been demonstrated by the plaintiff as an as a matter of law.
>
> This Court finds that such a conduct no reasonable jury would find by a prepondnerance of the evidence that the union's duty has been breached.

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[5] The transcript contains many clerical errors but is quoted verbatim.

The Court further finds that although the plaintiff has alleged union hostility, that to award him by virtue of some nebulous action of the FBI informant has introduced no substantial evidence by way of testimony or documentation to substantiate the bearing of some hostile motive.

I feel that it is crucial to recognize the union has no duty to provide an employee with an attorney at a grievance proceeding. Certainly it is the Court's opinion that would indicate that any reasons existing why it was necessary to do so in this particular instance.

As I said, the union is allowed considerable latitude in its representation of employees, and are not held to the strict standards of trial actions.

Thus the failure to interview particular witnesses or to ask questions of company representatives at the hearing would deny not in itself constitute breach of the duty of fair representation. In light of the cases, mere negligence, inadvertance or errors in judgment are insufficient as a matter of law to establish a breach of duty of fair representation.

Moreover this Court finds there is absolutely no evidence that the union acted with reckless disregard to a employee's rights, or was grossly deficient in its conduct in representing him.

Accordingly, I have carefully gone over all of the evidence, listened carefully to the evidence, accordingly evidence in the light most favorable to the plaintiff, this Court finds that no reasonable jury could conclude that the union breached its duty of fair representation. The defendant's motion for a directed verdict will be granted.

Bring the jury in, Marshal.

(JURY PRESENT)

THE COURT: Ladies and gentlemen, I am sorry to have kept you waiting so long. At the conclusion of all the testimony, each of defendants filed what is known as a motion for directed verdict. That is, there is insufficient evidence to submit this case to a

jury. It is during this period of time that I have been carefully studying and reviewing the evidence, and the law involved in this case.

It is the judgment of this Court that as a matter of law the plaintiff has not proven substantial facts to submit this case to you. They have not established under the criteria set forth in the cases that the union in any way breached its duty of fair representation; therefore, the matter will be withdrawn from your consideration.

I have granted the defendant's motion for directed verdict and you will be discharged. . . . As I said, I have determined that as a matter of law it should not be submitted to you.

(JURY EXCUSED)

THE COURT: There is absolutely no evidence the plaintiff has afforded any proof to show any kinds of collusion upon the union, itself, with anyone or among more particularly with the airline, TWA.

* * * *

In addition to the finding, at the conclusion of all the testimony, I wanted to further state for the record that the plaintiff also failed totally to establish that the union acted with any arbitrary or bad faith conduct on the part of the union and absolutely no evidence of any substantial evidence of any fraud, deceitful action.

At this point, the Union excused itself from the trial on Count II's Title VII claim against TWA. On February 26, 1987, the court entered an order, stating "Pursuant to this Court's oral ruling in open Court upon defendants' motion for directed verdict at the concluion of plaintiff's jury trial, it is hereby ordered and adjudged that the motion is granted". On March 30, 1987, the court entered findings of fact and conclusions of law dismissing Count II against TWA which read, in part,

Alvarez's own testimony [was] . . . that he believed he did not take his paycheck or sign his name thereto

> [but he also] testified variously that he did not know who took his paycheck, that he suspected a fellow employee took his check and that he in fact, knew who took his check but could not reveal that knowledge during the trial. Plaintiff ALVAREZ earlier wrote a letter to TWA . . . stating that he had consulted with a psychiatrist and hypnotist to put him in a trance to find out what happened to his check.

Also on March 30, 1987, the court denied Alvarez's motion to add Barnett Bank as a defendant.

Alvarez appealed. On September 13, 1988, three Eleventh Circuit judges issued a one-word per curiam affirmance pursuant to its Rule 36-1. That rule allows for affirmance without opinion when the court determines that an opinion would have no precedential value and "(a) the judgment of the district court is based on findings of fact that are not clearly erroneous; . . . (d) . . . directed verdict . . . is supported by the record [or] (e) judgment has been entered without an error of law."

SUMMARY OF ARGUMENT

Petitioner offers no persuasive reason for this Court to grant its discretionary review. He shows no conflict in decisions of courts of appeals; indeed, certain issues he proposes have been uniformily and repeatedly decided against him in both appellate and district courts. He argues no error that will make any difference to the outcome of his case. He proffers no inconsistency between the decisions below and the opinions of this Court other than patent misreadings of inapposite decisions. He demonstrates no significance of any issue presented except his unexplained statement that they are important. In final analysis, this case lacks any colorable reason to justify the attention of this Court. The trial judge found no legal or factual basis for Petitioner's claims. Three judges of the Eleventh Circuit concluded that Petition-

er's allegations of error did not merit the dignity of a written opinion. The present petition, like the trial and appeal, is frivolous. This action never should have been filed. It never should have been tried. It never should have been appealed to the Eleventh Circuit. It certainly should not be accepted for *certiorari* by this Court. Once again, Petitioner's counsel has found the federal judicial system an enjoyable place to play. See comments of Chief Justice Berger in *Clark v. Florida*, Case 85-6004, 54 LW 3713 (April 28, 1986). Unfortunately, Respondents have been forced to pay for his frolic.

REASONS FOR DENYING THE WRIT

I. Courts Are Unanimous That A Union's Failure To Use An Attorney In An Arbitration Does Not Breach Its Duty Of Fair Representation

There is no precedent in any of the circuits that requires a union to use an attorney at an arbitration to satisfy its duty of fair representation. To the contrary, circuit courts unanimously hold the opposite. *Walden v. Teamsters Local 71*, 468 F.2d 196 (4th Cir. 1972); *Grovner v. Georgia Pacific Corp.*, 625 F.2d 1289 (5th Cir. 1980) ("The union did not provide appellant with a lawyer . . . but as a matter of law these facts will not support appellant's claim against the Union"); *Castelli v. Douglas Aircraft*, 752 F.2d 1480 (9th Cir. 1985) ("Where a union representative assists an employee at arbitration, the union's failure to provide the employee with an attorney is not a breach of the duty of fair representation"); also see, *Higdon v. Steelworkers*, 537 F.Supp. 653 (S.D. Ga., 1982), *aff.* 706 F.2d 1561 (11th Cir. 1983); *Brown v. TWA*, 746 F.2d 1354 (8th Cir. 1984); and *Curtis v. UTU*, 700 F.2d 457 (8th Cir. 1983). Federal district courts reach identical conclusions. *Ciaccio v. Eastern Airlines*, 354 F.Supp. 1272 (E.D.N.Y. 1973); *Schleper v. Ford Motor Co.*, —— F.Supp. ——, 107 LRRM 2500 (D. Minn. 1980); *Steed v. UPS*, 512 F.Supp. 1088 (S.D. W.Va. 1981); *McFarland v. Teamsters Local*

745, —— F.Supp. ——, 110 LRRM 3022 (N.D. Tex. 1982).[6]

Moreover, Petitioner gives absolutely no hint what an attorney could have done for him that was left undone by District 142 representative, McCloat. The facts are clear that the Union, at least, presented the substance of Petitioner's claim to the arbitration panel. The abstract legal principle of whether a union breaches its duty every time it loses an arbitration case in which it does not employ an attorney, is an idea whose time has not yet come. It certainly is not a question to be considered under the facts present here.

II. The Decision Below Is Correct Without Regard To The Question Raised By Petitioner Concerning The Propriety Of Directed Verdicts

Petitioner asserts that the trial court erred in granting the Union's motion for directed verdict at the end of all the evidence and that, because the trial court had

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[6] In the courts below, Petitioner relied on two cases, *Del Casal v. Eastern Airlines*, 634 F.2d 295 (5th Cir. 1981) and *Seymore v. Olin Corp.*, 666 F.2d 202 (5th Cir. 1982). Both are distinguishable from this case. In *Del Casal* the union refused to supply a grievant with a regularly employed staff attorney before a System Board of Arbitration, contrary to its established practice for union members, because he was not a union member. Accordingly, the court affirmed an award to Del Casal for the expense he incurred by retaining private counsel after that private counsel was successful before the arbitration panel. In the instant case, of course, Petitioner was not denied a union staff attorney (the union employs none); the union's use of attorneys was not dependent on Petitioner's status as a union member (Petitioner was a union member and, in fact, had previously served as a union steward); and, Petitioner was not successful at the arbitration. The court in *Seymore* found sufficient evidence to conclude that the union refused to process a grievance because the employee *consulted* a private attorney. *Seymore* did not involve a union's obligation to furnish an attorney at the arbitration hearing; indeed, it recognized that a union may "limit the participation of privately retained counsel in grievance proceedings."

denied the Union's motion for summary judgment prior to trial. Petitioner was entitled to have his claims decided only by a jury. Petitioner thus advances the peculiar idea that a Rule 50 directed verdict is automatically foreclosed whenever the moving party previously has been unsuccessful obtaining summary judgment on the merits prior to trial. Wright & Miller, *Federal Practice and Procedure: Civil* § 2531 ("... cases agree that a verdict may be directed . . . even though summary judgment has been denied"). On its face, Petitioner's contention is too obviously insubstantial to justify review.

In any event, since Petitioner's claim is predicated on his right to a jury trial—a right recently rejected in *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988)—this Court is unlikely to reach the question rased by Petitioner because the trial court's disposition of Petitioner's claims against the Union was correct without regard to the issue. In short, if the cause were remanded to the trial court for decision, after *Leach*, the decision would be made by the trial court. Since, acting under its authority pursuant to Rule 41(b) the trial court certainly would reach the same conclusions it made when it withdrew the case from the jury's consideration, there is no need to consider the question raised by Petitioner in his second issue.

III. Petitioner's Preclusion Issue Rests On A Misreading Of *University Of Tennessee v. Elliott*

While we are uncertain about its relevance to his claim against the Union,[7] Petitioner's reading of *University of Tennessee v. Elliott*, 106 S.Ct. 3220 (1986), is

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[7] *Elliott* did not issue until almost two years after the Alvarez arbitration. Alvarez's unemployment claim was on appeal until September 14, 1984, more than a month after the System Board's August 13, 1984 decision. Moreover, the Union was not a party to Alvarez's unemployment proceedings. Finally, the rule recognized in arbitration generally and specifically before the IAM-TWA System Board of Adjustment is that unemployment decisions are not binding on arbitrators. See generally, Elkouri and Elkouri, *How Arbitration Works*, BNA, 4th Ed., 1985, p. 392.

wrong. That decision does not hold, as Petitioner asserts, "that federal courts must give preclusive effect to fact finding of a state agency, as part of a federal common law of preclusion". Rather, it requires that in actions arising under Reconstruction-era Civil Rights Acts, federal courts must give a state agency's findings the same preclusive effect they would receive in the state court if the state agency acted in a judicial capacity and resolved issues properly before it which the parties had an adequate opportunity to litigate; however, preclusive effect need not be given in federal litigation or under Title VII of the Civil Rights Act of 1964. In short, Petitioner seeks review based on Supreme Court law that does not exist. Moreover, *Elliott* has no possible reach to evidence in arbitration proceedings, to a union's duty to present a grievance or to any other matter remotely related to this case. Accordingly, Petitioner presents no reason for this Court to review the decisions below because of an improper application of federal preclusion principles.

CONCLUSION

This lawsuit is, and from its inception has been, a meritless exercise based upon insufficient facts and contrary to well-established law. Were it not for the extraordinary expense suffered by Respondents defending the frivolous claims repeatedly made by Petitioner and his counsel, the entire matter could be characterized as an unfunny joke. Petitioner raises no issue deserving review by this Court. *Certiorari* should be denied.

Respectfully submitted,

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